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In the Supreme Court of the United States

OCTOBER TERM, 1956

No.

UNITED STATES OF AMERICA, PETITIONER

v.

KOPPERS COMPANY, INC., SUCCESSOR ON MERGER TO KOPPERS UNITED COMPANY AND SUBSIDIARIES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims entered in this case.

OPINION BELOW

The opinion of the Court of Claims (Appendix, *infra*, pp. 8–32) is reported at 134 F. Supp. 290.

JURISDICTION

The judgment of the Court of Claims was entered on January 31, 1956. (Appendix, *infra*, pp. 32–33.) On April 13, 1956, the time within which to file a petition for a writ of certiorari was extended, by order of the Chief Justice, to June 29, 1956. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1255 (1).

QUESTION PRESENTED

Whether an unused excess profits credit of a corporation resulting from a statutory merger may be carried back and deducted from the consolidated excess profits net income of the merged corporations under Section 710 (b) and (c) of the Internal Revenue Code of 1939.

STATUTE INVOLVED

Internal Revenue Code of 1939:

CHAPTER 2—ADDITIONAL INCOME TAXES

* * * * *

SUBCHAPTER E—EXCESS PROFITS TAX

Part I

SEC. 710 [As added by Sec. 201, Second Revenue Act of 1940, c. 757, 54 Stat. 974]. IMPOSITION OF TAX.

(a) *Imposition.*—

(1) [as amended by Sec. 202, Revenue Act of 1942, c. 619, 56 Stat. 798] *General Rule.*—There shall be levied, collected, and paid, for each taxable year, upon the adjusted excess-profits net income, as defined in subsection (b), of every corporation (except a corporation exempt under Section 727) a tax equal to whichever of the following amounts is the lesser:

* * * * *

(b) [as amended by Sec. 2 (a), Excess Profits Tax Amendments of 1941, c. 10, 55 Stat. 17, and Sec. 204 (a), Revenue Act of 1942, *supra*] *Definition of Adjusted Excess Profits Net Income.*—As used in this section, the term

"adjusted excess profits net income" in the case of any taxable year means the excess profits net income (as defined in section 711) minus the sum of:

(1) *Specific exemption.*— * * *

(2) *Excess profits credit.*—The amount of the excess profits credit allowed under section 712; and

(3) *Unused Excess profits credit.*—The amount of the unused excess profits credit adjustment for the taxable year, computed in accordance with subsection (c).

(c) [as added by Sec. 2 (b), Excess Profits Tax Amendments of 1941, *supra,* and amended by Sec. 204 (b), Revenue Act of 1942, *supra*] *Unused Excess Profits Credit Adjustment.*—

(1) *Computation of unused excess profits credit adjustment.*—The unused excess profits credit adjustment for any taxable year shall be the aggregate of the unused excess profits credit carry-overs and unused excess profits credit carry-backs to such taxable year.

(2) *Definition of unused excess profits credit.*—The term "unused excess profits credit" means the excess, if any, of the excess profits credit for any taxable year beginning after December 31, 1939, over the excess profits net income for such taxable year, computed on the basis of the excess profits credit applicable to such taxable year. * * *

(3) *Amount of unused excess profits credit carry-back and carry-over.*—

(A) *Unused Excess Profits Credit Carry-Back.*—If for any taxable year beginning after December 31, 1941, the taxpayer has an unused excess profits credit, such unused excess profits

credit shall be an unused excess profits credit carry-back for each of the two preceding taxable years, * * *

(B) *Unused Excess Profits Credit Carry-Over.*—If for any taxable year beginning after December 31, 1939, the taxpayer has an unused excess profits credit, such unused excess profits credit shall be an unused excess profits credit carry-over for each of the two succeeding taxable years, * * *

* * * * *

(26 U. S. C. 1952 ed., Sec. 710.)

STATEMENT

The facts as stipulated (R. 19–87) and found by the Court of Claims (Appendix, *infra,* pp. 25–32) may be summarized as follows:

Koppers United Company was the parent of a group of four companies which filed a consolidated excess profits tax return for the calendar year 1943. Two members of the group were Massachusetts trusts, and the other two were Delaware corporations. Koppers Company, Inc. (hereafter called the taxpayer) is a Delaware corporation organized on September 30, 1944. On November 10, 1944, Koppers United Company and its subsidiaries were merged into the taxpayer corporation by virtue of a Certificate of Agreement of Merger filed with the Recorder of Deeds of New Castle County, Delaware. (R. 19–23, 30–33; Appendix, *infra,* pp. 25–26.)

For its first taxable period, September 30–December 31, 1944, taxpayer had an unused excess profits credit and sought to carry back and apply the credit in reduction of the consolidated excess profits tax

liability of the merged corporations for the year 1943. The Commissioner disallowed the claimed carry-back, and the taxpayer brought suit for refund. (R. 22–26; Appendix, *infra,* pp. 26–32.) The Court of Claims reversed the Commissioner's determination and allowed the carry-back. (Appendix, *infra,* pp. 8–25.)

REASONS FOR GRANTING THE WRIT

The question in this case is similar to that presented in *Libson Shops, Inc.* v. *Koehler,* No. 64, October 1956 Term, in which the taxpayer's petition for a writ of certiorari was granted on June 4, 1956. In *Libson,* the issue is whether pre-merger net operating losses of merged corporations may be carried over and deducted from the post-merger income of the corporation resulting from the merger, while here it is whether a post-merger unused excess profits credit of the resulting corporation may be carried back and offset against the pre-merger excess profits income of the merged corporations.

The Government opposed the granting of certiorari in *Libson* on the ground, among others, that the decision of the Court of Appeals was not in direct conflict with either of the two cases upon which the taxpayer there relied for conflict (*Stanton Brewery* v. *Commissioner,* 176 F. 2d 573 (C. A. 2d); *E. & J. Gallo Winery* v. *Commissioner,* 227 F. 2d 699 (C. A. 9th)), nor with any other case. Our brief in opposition pointed out that other cases in this area turned on the bare question whether a merger, since it results in a change of the taxable entity, necessarily precludes carry-back and carry-overs. In *Libson,* the

court of appeals not only considered that broad question; in disallowing the carry-over, it relied upon particular circumstances showing that the business carried on after the merger was not the same as that previously carried on and that, in the absence of the merger, there would have been no operating loss deduction. Certiorari having been granted in *Libson,* the Government is uncertain whether in doing so the Court considered that case to be in conflict with those relied upon by the taxpayer in its petition (the *Stanton* and *Gallo* cases, *supra*), or with that of the Court of Claims in the instant case, or with that of the Court of Appeals for the First Circuit in *Newmarket Manufacturing Co.* v. *United States,* decided May 18, 1956.[1]

In any event, it now appears likely that this Court, in deciding *Libson,* will have occasion to consider the broad question whether a carry-over or carry-back may, in any circumstances, cross the line of a merger, an issue present in both the instant case and in the *Newmarket* case. In order to protect the Government's interest in this question and to safeguard the substantial amount of revenue involved, we are filing

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[1] As pointed out in fn. 2 of the *Libson* brief in opposition to certiorari, the Government refrained from applying for certiorari in *Gallo* because of the absence of a conflict, but obtained an extension of time for filing a petition in this case (*Koppers*) because of the pendency before the First Circuit of an appeal from the District Court's decision in the *Newmarket* case (130 F. Supp. 706 (Mass.)), and the possibility that a conflict with *Koppers* might be created in the event that the appeal in *Newmarket* was decided in the Government's favor. The *Newmarket* case having since been decided adversely to the Government, the possible conflict to which we then adverted has not developed.

this petition and, also, a petition in *Newmarket*. We suggest that the Court may deem it appropriate to hold both of these petitions in abeyance pending its decision in the *Libson* case.

Respectfully submitted.

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JUNE 1956.

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APPENDIX

In the United States Court of Claims

No. 161–52

(Decided October 4, 1955)

KOPPERS COMPANY, INC., SUCCESSOR ON MERGER TO KOPPERS UNITED COMPANY AND SUBSIDIARIES

v.

THE UNITED STATES

Mr. David W. Richmond for the plaintiff. *Messrs. Robert N. Miller, Frederick O. Graves, Miller & Chevalier, E. S. Ruffin, Jr.,* and *C. M. Crick,* were on the briefs.

Mr. John A. Rees, with whom was *Mr. Assistant Attorney General H. Brian Holland,* for the defendant. *Mr. Andrew D. Sharpe* was on the brief.

LITTLETON, *Judge,* delivered the opinion of the court:

The plaintiff sues to recover $1,486,667.22, with interest thereon, which sum represents excess profits tax and interest for the calendar year 1943. Three issues were presented in the amended petition. One involved interest on "potential deficiencies" and one involved net operating loss carry-backs. Both of these issues have been abandoned by plaintiff because of the adverse decisions in *United States* v. *Koppers,*

Inc., 348 U. S. 254, and *United States* v. *Olympic Radio & Television, Inc.*, 349 U. S. 232. The remaining issue is whether an unused excess profits credit for the first taxable period of a surviving corporation in a statutory merger can be employed as an unused excess profits credit carry-back under section 710 (c) (3) (A) of the Excess Profits Tax Act of 1940, as amended,[1] to reduce the consolidated excess profits net income of the corporations which were merged.

The facts, which have been stipulated by the parties, may be summarized as follows: Koppers United Company was the parent company of Fuel Investment Associates, Koppers Company and The Koppers Erecting Corporation. The first two companies were Massachusetts trusts and the latter two were Delaware corporations. Koppers United Company and its subsidiaries filed a consolidated excess profits tax return for 1943 disclosing an excess profits net income of $14,840,421.35, an excess profits credit of $4,070,456.97 and an excess profits tax liability of $8,719,621.15. Koppers United Company paid $6,539,715.86 of this liability.

On September 30, 1944, Koppers Company, Inc., the plaintiff herein, was organized. On November 10, 1944, Koppers United Company and its subsidiaries were merged under the laws of Delaware into the Koppers Company, Inc. The Commissioner ruled that the merger was a tax free reorganization under section 112 of the code. The balance of the excess profits tax liability for 1943 was paid by the plaintiff, the surviving corporation. A deficiency of $366,-

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[1] 54 Stat. 975, 26 U. S. C. § 710 et seq., Supp. IV, 1940 ed.; repealed by Act of November 8, 1945, 59 Stat. 568.

079.15 for 1943, plus interest of $210,110.13 was assessed against plaintiff and its predecessors and was paid by plaintiff.

Returns were filed and the taxes shown thereon were paid for the taxable period January 1, 1944, to November 10, 1944. On February 6, 1951, plaintiff executed an Agreement to Amount of Constructive Average Base Period Net Income Determined Under Section 722 for the taxable period ended November 10, 1944. The constructive average base period net income agreed to for this period, $3,525,481.13, resulted in an excess profits credit of $3,260,875.07 for this period and an overpayment of excess profits tax in the amount of $153,733.52. This overpayment has apparently been refunded or credited to plaintiff. The amount of section 722 relief (increase in average base period net income) allowed for the taxable period ended November 10, 1944, was $597,171.13.

The plaintiff filed an excess profits tax return for the taxable period September 30, 1944, to December 31, 1944, disclosing an excess profits net income of $679,609.22, and an excess profits credit of $1,529,-711.46. After adjustments made by defendant, plaintiff had no excess profits net income for this taxable period of 1944. The plaintiff claims an unused excess profits credit carry-back in the amount of $435,551.74. The defendant disputes plaintiff's right to carry back any amount but admits that plaintiff has an unused excess profits credit in the amount of $384,517.64. It has been stipulated that the taxable year in which the unused excess profits credit arose was the period September 30, 1944, to December 31, 1944, and that the period January 1, 1944, to November 10, 1944, is the first preceding taxable year. The calendar year 1943, which is before the court, is the second preceding

taxable year for purposes of the carry-back issue here in question.

Section 710 (c) (3) (A) provides:

> (3) Amount of unused excess profits credit carry-back and carry-over—(A) Unused excess profits credit carry-back.
>
> If for any taxable year beginning after December 31, 1941, the taxpayer has an unused excess profits credit, such unused excess profits credit shall be an unused excess profits credit carry-back for each of the two preceding taxable years, except that the carry-back in the case of the first preceding taxable year shall be the excess, if any, of the amount of such unused excess profits credit over the adjusted excess profits net income for the second preceding taxable year computed for such taxable year (i) by determining the unused excess profits credit adjustment without regard to such unused excess profits credit, and (ii) without the deduction of the specific exemption provided in subsection (b) (1).

The plaintiff contends that it is the same taxpayer as its constituent companies for the purposes of section 710 (c) (3) (A) since it absorbed them in a statutory merger and that it is the taxpayer for purposes of section 710 (c) (3) (A) because the tax to be reduced is its own direct and primary liability. The defendant contends that plaintiff is not the taxpayer within the meaning of section 710 (c) (3) (A) and that Congress did not intend to allow the carry-back.

The literal language of the code allows the carry-back. Section 740 (a) provides: "* * * The term 'acquiring corporation' means—* * * (3) A corporation the result of a statutory merger of two or more

corporations * * *." Subsection (b) of section 740 provides: "* * * The term 'component corporation' means— * * * (3) In the case of a statutory merger, all corporations merged, except the corporation resulting from the merger * * *." The plaintiff was clearly an "acquiring corporation" and the companies it absorbed were "component corporations." Section 742 provides: "Supplement A average base period net income. In the case of a taxpayer which is an acquiring corporation, its average base period net income (for the purpose of the credit computed under section 713) shall be the amount computed under section 713 or the amount of its Supplement A average base period net income, whichever is the greater * * *." Basically, the average base period net income computed under this section is the consolidated excess profits net income with certain adjustments not here material. That plaintiff was entitled to compute its average base period net income under section 742 is clear and is conceded by the defendant.

The section 742 average base period net income is then used to determine the taxpayer's excess profits credit under section 713 (a). After the amount of the excess profits credit is determined, the specific exemption, if any, the excess profits credit and the unused excess profits credit, if any, are deducted from the excess profits net income in arriving at the adjusted excess profits net income. The unused excess profits credit is the amount of the unused excess profits credit adjustment computed under subsection (c) of section 710. Subsection (c) (1) provides that the adjustment is the aggregate of the unused excess profits credit carry-overs and unused excess profits

credit carry-backs. Subsection (c) (2) provides: "* * * The term 'unused excess profits credit' means the excess, if any, of the excess profits credit for any taxable year beginning after December 31, 1939, over the excess profits net income for such taxable year, computed on the basis of the excess profits credit applicable to such taxable year. * * *" Paragraph (3) of section 710 (c) provides: "* * * (A) If for any taxable year beginning after December 31, 1941, the taxpayer has an unused excess profits credit, such unused excess profits credit shall be an unused excess profit credit carry-back for each of the two preceding taxable years * * *." Because of the interrelationship of sections 740, 742, 713 and 710, the literal language of the code specifically provides for such a carry-back of an unused excess profits credit.

The defendant contends, however, that since Congress was specific in setting forth in section 742 how the average base period net income should be determined when there was a merger, consolidation, or other joinder of taxpayers, and did not expressly state in that section that an acquiring corporation was entitled to a carry-back, or carry-over of an unused excess profit credit, Congress did not intend to allow such a carry-back or carry-over. The Tax Court appears to have adopted this position. *Stanton Brewery, Inc.* v. *Commissioner,* 11 T. C. 310, reversed 176 F. 2d 573; *California Casket Co.* v. *Commissioner,* 19 T. C. 32. We cannot agree.

The defendant's argument based on section 742 is not well founded. Section 742 strengthens rather than weakens plaintiff's case. That section provides, what would otherwise be lacking in specificity, that the acquiring corporation can use its components'

base period experience to determine its average base period net income, which in turn is used to determine its excess profit credit. Section 742 is merely a stepping stone for the plaintiff in determining its excess profits credit. It does not pretend to cover all problems or questions that may arise from a merger and is not a restriction on section 710 (c) (3). We think it is clear that the section 742 average base period net income is used just the same as the section 713 average base period net income to determine the taxpayer's excess profits credit under section 713 (a). Once the excess profits credit is determined under section 713 (a), section 742 has served its purpose. Section 710 then comes into play and provides how the credit is to be employed. As is seen from the above analysis the excess profits credit based on the average base period net income determined under section 742 is used the same in section 713 (a) and 710 as the average base period net income determined under section 713. Thus a taxpayer which qualifies under section 740 to compute its average base period net income under section 742 is treated by the code, for the purpose of the excess profits credit and its use, as the same taxpayer as its components.

The amendment to subsection (c) of section 710 allowing the carry-back of an unused excess profits credit was enacted at the same time section 740 and 742 were amended.[2] If Congress had desired to restrict the benefit of the unused excess profits credit carry-back to those corporations which computed their average base period net income under section 713, it would appear that it would have specifically done so. No such restriction was imposed. Also, when the purpose of the excess profits tax provisions of con-

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[2] Revenue Act of 1942, 56 Stat. 798, 900, 923, 925. See footnote 4.

fiscating excess profits is considered in conjunction with the purpose of section 710 (c) of ameliorating the fluctuations in profits for the over-all purpose of exacting the true *excess* profits, it is difficult to find a distinction of substance between a surviving corporation in a tax-free reorganization which continues the same business with substantially the same stockholders and which is allowed to use its components' base period experience, and a corporation that has undergone no change in form. When we turn to the unused excess profits credit carry-back's counterpart (the unused excess profits credit carry-over) the question is somewhat complicated. The interrelationship of the applicable sections does not automatically and so clearly allow the carry-over of an unused excess profits credit from the component corporations to the surviving corporation. Also, in connection with mergers, consolidations and other joinders of taxpayers, a net operating loss, capital loss, and pension and profit sharing carry-backs and carry-overs, are not clearly covered by the code. The fact that these other carry-back and carry-over provisions are not as clearly covered by the code may suggest that coverage of the unused excess profits credit carry-back in this type of situation was more fortuitous than intentional. Fortuitous or not, the code clearly allows such a carry-back of an unused excess profits credit. Moreover, if the surviving corporation is treated for tax purposes as the same "taxpayer" as its components or predecessors, the carry-backs and carry-overs are covered by the code.

We think the approach taken in *Stanton Brewery, Inc.* v. *Commissioner,* 176 F. 2d 573, was sound and in accord with the existing statutory scheme and legislative policy relative to tax problems and consequences of corporate reorganizations. The issue pre-

sented in that case was whether the surviving corporation in a statutory merger was entitled to carry over an unused excess profits credit of one of its components. The court, with Judge L. Hand dissenting, held that the carry-over was available under section 710 (c) (3) (B). It pointed out the overly technical and unrealistic approach in attempting to determine which corporation merged into which in order to ascertain which corporation had the credit. The court then stated:

> * * * We doubt, therefore, that any of these linguistic formulae suggests a really fruitful approach to the solution of our present problem. More properly we must regard the "resulting corporation" as the union of component corporations into an all-embracing whole which absorbs the rights and priveleges, as well as the obligations, of its constituents.

The plaintiff, of course, relies on the *Stanton Brewery* case, and the defendant contends that it was incorrectly decided. Essentially the same arguments were presented in that case as in the instant case and what the court said there sustaining the taxpayer's position and disposing of the defendant's position is applicable to the facts of the present case.

The surviving corporation in a statutory merger represents the continuation of a business that was operated before in the form of its constituents. For practical, business, and many tax purposes, its is treated the same as its components which formed it. It accedes to the rights and privileges as well as the obligations of its components by operation of law. It becomes primarily liable for the tax obligations of its components as the taxpayer and not secondarily liable as a transferee. See *Commissioner* v. *Oswego Falls Corporation,* 71 F. 2d 673. It is treated as the

taxpayer involving transactions of its constituents before the merger for purposes of review by the Tax Court. *Bowman Hotel Corporation* v. *Commissioner,* 24 B. T. A. 1193 and the cases following that decision. It was treated the same for dividend carry-over in *Adrian & James, Inc.* v. *Commissioner,* 4 T. C. 708; for carry-over of the adjusted declared value for capital stock tax purposes in *Early* v. *Southgate Corporation,* 136 F. 2d 217; and the deduction of unamortized bond discount and expense in connection with a redemption of bonds of a constituent company in *Helvering* v. *Metropolitan Edison Co.,* 306 U. S. 522.

The Supreme Court stated in the *Metropolitan Edison Company* case that the transaction had "all the elements of a merger and comes within the principle that the corporate personality of the transferor is drowned in that of the transferee. It results that the continuing corporation may deduct unamortized bond discount and expense in respect of the obligations of the transfering affiliate." Although the *Metropolitan Edison Company* case may be distinguishable on the ground that the unamortized bond discount and expenses in respect to bond retirement was a direct expense of the surviving corporation and not a loss of the merged component, the case was not decided on that ground.

It also may be noted that the *Sansome* rule was originally predicated on the theory that the surviving corporation in a tax free reorganization was a continuation of the prior corporations for the purpose of determining distribution of earnings and profits as distinguished from capital distributions of the survivor. *Commissioner* v. *Sansome,* 60 F. 2d 931, cert. denied 287 U. S. 667. In *Commissioner* v. *Munter,* 331 U. S. 210, 213, the Court stated that the *San-*

some rule "for tax purposes, treats a reorganized corporation as but a continuation of its predecessors * * *." The Court held that the rule was applicable notwithstanding the participation of new investors in the successor corporation. In *Commissioner* v. *Phipps,* 336 U. S. 410, the necessity of preventing the escape of earnings and profits from taxation was substituted as the underlying rationale by the Court in holding that the earnings and profits of the survivor were not erased by the deficits of the merged components.

The defendant contends that *New Colonial Ice Co., Inc.* v. *Helvering,* 292 U. S. 435, involving a net-operating loss carry-over, is more analogous to the instant case. In the *New Colonial Ice Company* case the creditors and stockholders of the old corporation organized a new corporation which continued the business, purchased the assets, and assumed the liabilities of the old corporation. The old corporation continued in existence for more than a year. The new corporation claimed the net operating loss of the old corporation. In denying the carry-over, the Supreme Court stated that the two corporations were separate and distinct entities, the loss was personal and that the carry-over was an exception to the general rule and unless Congress indicated a clear intention to allow such a carry-over, it should not be allowed.

The plaintiff distinguishes the *New Colonial Ice Company* case on the ground that it involved a purchase of the assets and assumption of the liabilities, whereas the *Metropolitan Edison Company* case and the instant case deal with mergers. The Supreme Court's decision in the *Metropolitan Edison Company* case was based on the earlier developed distinction between a merger or consolidation and a purchase of the assets and assumption of the liabilities of the

predecessor. The corporation which was merged or consolidated was treated essentially the same as its components, since the transfer was by operation of law, whereas the corporation which purchased the assets and assumed the liabilities of its predecessor was treated as a separate taxable entity. *American Gas & Electric Company* v. *United States*, 84 C. Cls. 92, 105. The Commissioner adopted and followed this distinction for many years. Recently, however, he has abandoned it and taken the position that the corporations are separate and distinct taxpayers.

A discussion of the *New Colonial Ice Company* doctrine in view of the change in legislative policy is deemed appropriate. That case was decided under the restrictive language of section 204 (b) of the Revenue Act of 1921, 42 Stat. 227, 231. The pertinent part of that section provided that if "any taxpayer has sustained a net loss, the amount thereof shall be deducted from the net income of the taxpayer for the succeeding taxable year * * *." The Court referred to the general policy of the statute and stated that nothing in that policy indicated an intention to allow the successor corporation the net operating loss of its predecessor.

The legislative policy and statutory scheme since the 1921 Revenue Act reflects a more liberal and realistic approach to problems arising from corporate reorganizations.[3] The language of the carry-back and carry-over provisions have been broadened and the years available for leveling out the fluctuations in earnings have been extended.[4] Elaborate corporate

[3] See N. Y. U. Sixth Inst. Fed. Tax 327 (1948) for an analysis of the *New Colonial Ice Company* case under present law.

[4] See H. Rep. No. 855, 76th Cong., 1st Sess. 9; H. Rep. No. 146, 77th Cong., 1st Sess. 2; S. Rep. No. 1631, 77th Cong., 2d Sess. 51–52.

reorganization provisions have been inserted in the code liberalizing the tax free exchange provisions to allow non-recognition of gain or loss on more transactions and the carry-over of the basis of the old corporation's assets and generally conferring upon the new corporation the same tax status of the old corporation. The purpose of these provisions was to allow the corporation to make formal readjustments and carry out ordinary business transactions without disastrous tax consequences.[5] In tax free reorganizations, the successor corporation is entitled under section 742 to use the average base period net income of its components, with certain adjustments, in determining its excess profits credit. The changes reflect a legislative policy of having tax consequences of tax free reorganizations turn on matters of substance rather than technicality or form. In interpreting the taxing statute the courts look to the substance of the transaction rather than its form and the status of the taxpayer depends on an interpretation of the sections under review in light of the purpose for which they were designed. Two taxpayers are generally considered as separate and distinct, but when the purpose of Congress is better fulfilled they are treated as one taxpayer. See *Gregory* v. *Helvering,* 293 U. S. 465; *Ingle Coal Corporation* v. *United States,* No. 50326, decided January 11, 1955, — C. Cls. —; *Stanton Brewery* v. *Commissioner, supra,* and cases there cited. Whether the *New Colonial Ice Company* case should still be held controlling in the non-merger and consolidation cases in view of the changes in legislative policy is not necessary for us to

[5] H. Rep. No. 179, 68th Cong., 1st Sess. 13; S. Rep. No. 398, 68th Cong., 1st Sess. 14–15. See section 129 of the code which was designed to prevent tax avoidance by devices or schemes.

decide since the plaintiff does not fall within that category.

The defendant relies on Public Law 189, 80th Cong., 1st Sess., Act of July 15, 1947, 61 Stat. 324, 26 U. S. C. § 122 note, to support its contention that Congress did not intend to permit a surviving corporation in a statutory merger to have the benefit of the carry-back provisions. That act allowed reorganized bankrupt railroads the benefit of the carry-over and carry-back provisions regardless of whether they were reorganized under the same charter or a new charter. Some state laws prohibited the use of the same charter and some courts were holding that the reorganized railroad under a new charter was not the same taxpayer. The purpose of the act was to remedy this inequality.[6] We think that act represents a clarification rather than a change in the existing law. See *Stanton Brewery* v. *Commissioner, supra,* at p. 577.

Not only does the code support the plaintiff, but also the decision of the Supreme Court in the *Metropolitan Edison Company* case, treating the surviving corporation in a merger as the same taxpayer as its components for the purpose of allowing unamortized bond discount loss of its components to be deducted by the survivor, amply supports the plaintiff's position that it should be treated as the same taxpayer as its components for the purpose of an unused excess profits credit carry-back to reduce the consolidated excess profits net income of the corporations which were merged. The plaintiff's right to the carry-back is further supported by the change in legislative policy and statutory scheme of adopting a more realistic and practical approach to the problems arising out of corporate reorganizations, which is reflected in the

[6] H. Rep. No. 624, 80th Cong., 1st Sess. 1.

statutory changes recognizing and treating the surviving corporation as essentially the same taxpayer as its components or predecessors.

We are aware of section 381 of the 1954 code (68A Stat. 124), which specifically provides for carry-overs in certain corporate acquisitions and specifically denies the carry-back of a net operating loss except where the change was merely one of identity, form, or place of organization. We feel that this section, to the extent that it specifically allows carry-overs, reflects a continuation of the previous realistic approach to corporate reorganization problems and that the provision specifically disallowing a net operating loss carry-back is a change in prior policy and law. The defendant admitted that the Commissioner has for years adopted the position that the surviving corporation in a merger or consolidation was entitled to carry back or over the net operating loss of its components or predecessor and generally treating the new corporation the same as the old corporation. The Committee Reports[7] accompanying H. R. 8300, which became the Internal Revenue Code of 1954, state: "No inference is to be drawn from the enactment of this section whether any item or tax attribute may be utilized by a successor or a predecessor corporation under existing law."

Inasmuch as we have decided that plaintiff is entitled to carry back its unused excess profits credit to the second preceding taxable year to reduce the consolidated excess profits net income of the companies which were merged, the question of the amount of the carry-back is presented. The amount of the carry-back depends on the amount of the excess profits credit, which credit depends on whether the plaintiff is entitled to use the constructive average base period

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[7] H. Rep. No. 1337, 83rd Cong., 2d Sess. 135; S. Rep. No. 1622, 83rd Cong., 2d Sess. 277.

net income, or is required to use the average base period net income of its components adjusted for the short taxable period. If the excess profits credit is based on the constructive average base period net income of the plaintiff's components, the amount of the carry-back is $435,551.74, as the plaintiff contends. If the excess profits credit is based on the average base period net income of the plaintiff's components, the amount of the carry-back is $384,517.64, as the defendant contends.

The defendant contends that the section 722 determination is only applicable to a particular taxpayer for a single taxable period. It is true that the Commissioner has the power under section 722 to redetermine the section 722 allowance each year. In many cases it is necessary to redetermine the allowance in order to ascertain what is a fair and normal average income. An example is where some or all of the component corporations were not in existence during the base period years. However, section 722 provides that the Commissioner may by regulation prescribe the extent to which the limitations of that section can be waived for the determination of the tax for subsequent taxable years. Regulations 112, Sec. 35.722–5 (e) provides that if no substantial evidence exists which requires a redetermination of the constructive average base period net income, it may be used by the taxpayer in subsequent taxable years. However, it also provides:

> * * * If a taxpayer, which pursuant to the preceding sentence would otherwise be entitled to use a constructive average base period net income previously determined, is acquired by another corporation in a transaction which under Supplement A constitutes it a component corporation and the transferee an acquiring corporation, or if such taxpayer becomes a member

> of an affiliated group which makes a consolidated excess profits tax return, the average base period net income of the acquiring corporation, or the consolidated average base period net income of the affiliated group, as the case may be, may not as of right include such constructive average base period net income. * * *

In such cases it provides that the acquiring corporation must file an application and establish its eligibility for relief.

From the defendant's argument on this point, it is not clear whether it disputes the plaintiff's right to use its components' constructive average base period net income to determine its excess profits tax credit, or whether the defendant concedes the plaintiff's right to use its components' constructive average base period net income for purposes of determining its excess profits credit, but disputes plaintiff's right to carry back any of the unused excess profits credit which resulted from the increase allowed under section 722. If the latter is its position, our above discussion allowing the carryback of an unused excess profits credit based on the average base period net income, section 722 and the Commissioner's regulations dispose of this point in favor of the plaintiff. However, if the former is the defendant's position, the plaintiff, in order to use the constructive average base period net income as the basis for its carry-back, needs the Commissioner's consent to use its components' constructive average base period net income, or his determination of the proper constructive average base period net income pursuant to section 722. By reason of section 732 we have no jurisdiction to determine what plaintiff's constructive average base period net income should be.

The plaintiff is entitled to carry back the unused excess profits credit based on its average base period net

income, under section 710 (c) (3) (A), to reduce the 1943 consolidated excess profits net income of the companies merged and to recover the overpayment resulting therefrom, with interest as provided by law. Whether plaintiff is entitled to a carry-back based on the constructive average base period net income depends on defendant's position. The defendant is requested to file a memorandum clarifying its position with respect to the problem mentioned by reason of the section 722 allowance. Plaintiff will be allowed 20 days to file a reply thereto.

Entry of judgment is suspended pending the filing of defendant's and plaintiff's memorandum briefs and a stipulation by the parties showing the amount due plaintiff in accordance with this opinion.

It is so ordered.

LARAMORE, *Judge;* MADDEN, *Judge;* WHITAKER, *Judge;* and JONES, *Chief Judge,* concur.

FINDINGS OF FACT

The court makes findings of fact, based upon the stipulation of the parties, and the briefs and argument of counsel, as follows:

1. Koppers United Company was the parent company of a group of corporations which filed a consolidated excess profits tax return for the calendar year 1943. The return on Form 1121 was filed September 15, 1944, with the collector of internal revenue at Pittsburgh, Pennsylvania, disclosing thereon excess profits net income of $14,840,421.35, an excess profits credit of $4,070,456.97, and an excess profits tax liability of $8,719,621.15. Koppers United Company paid $6,539,715.86 of this tax liability and the balance, $2,179,905.29, was paid by Koppers Company Inc., suc-

cessor on merger to Koppers United Company, the dates of the various payments being:

Paid by Koppers United Company:	
March 15, 1944	$2,037,500.00
June 15, 1944	2,037,500.00
September 15, 1944	2,464,715.86
Total paid by Kroppers United Company	6,539,715.86
Paid by Kroppers Company, Inc., December 15, 1944	2,179,905.29
	8,719,621.15

2. Koppers United Company, together with Koppers Company, The Koppers Erecting Corporation and Fuel Investment Associates, each of which companies were included in the consolidated excess profits tax return of Koppers United Company and Subsidiaries for 1943, were merged into Koppers Company, Inc., the plaintiff herein, by virtue of a Certificate of Agreement of Merger filed with the Recorder of Deeds for New Castle County, Delaware, on November 10, 1944.

3. By timely filed consents, the plaintiff, as successor on merger to Koppers United Company, and the Commissioner of Internal Revenue mutually agreed that the amount of any income, excess profits, or war profits tax due by Koppers United Company as parent of the consolidated group for 1943 could be assessed at any time on or before June 30, 1951.

4. On February 9, 1951, the Internal Revenue Agent in Charge at Pittsburgh transmitted to the plaintiff recomputations of proposed deficiencies in consolidated excess profits tax for Koppers United Company and Subsidiaries for 1940 to 1943, inclusive. The recomputation for 1943 showed excess profits net income of $14,543,796.44, an excess profits credit of $3,321,882.48 and a proposed deficiency in excess profits tax of $366,079.15.

5. On February 14, 1951, the plaintiff as successor on merger to Koppers United Company, filed a "Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and Acceptance of Overassessment", agreeing to the proposed deficiency of $366,079.15 for 1943. On March 8, 1951, the Commissioner issued a formal notice by registered mail to Koppers United Company and Subsidiary Companies, c/o Koppers Company, Inc., in which he determined a deficiency in excess profits tax for these companies for 1943 in the amount of $366,079.15. This deficiency, together with interest of $210,110.13, was assessed against Koppers United Company and Subsidiaries, Koppers Company, Inc., successor on merger, on the April 17, 1951, special assessment list #4 for the 23rd District of Pennsylvania. On April 19, 1951, the collector at Pittsburgh issued a "Statement of Income Tax Due", demanding payment of excess profits tax of $366,079.15, and interest of $210,110.13. The plaintiff paid the deficiency in 1943 excess profits tax of $366,079.15, together with interest of $210,110.13, to the collector at Pittsburgh on April 24, 1951.

6. On June 29, 1951, the plaintiff filed with the collector a claim for refund on Form 843 in which it was claimed that the excess profits tax liability of Koppers United Company and Subsidiaries for the calendar year 1943 had been overpaid in the amount of $1,612,035.83, and that excessive interest had been paid by the plaintiff in the amount of $56,296.56, and that these amounts had been erroneously and illegally collected by the collector. On December 13, 1951, the Commissioner of Internal Revenue sent the plaintiff by registered mail a statutory notice of the disallowance of the claim for refund.

7. The alleged overpayment of excess profits tax for

the calendar year 1943 arises from circumstances set out in the following findings.

Koppers Company, Inc., plaintiff herein, was organized under the laws of the State of Delaware on September 30, 1944, and Koppers United Company, Koppers Company, The Koppers Erecting Corporation and Fuel Investment Associates, the incomes of which companies are included in the computation of the consolidated excess profits tax of Koppers United Company and Subsidiaries for the calendar year 1943, were merged into the plaintiff by virtue of a Certificate of Agreement of Merger filed with the Recorder of Deeds for New Castle County, Delaware, on November 10, 1944.

8. Subsequent to the merger, the plaintiff filed its excess profits tax return for the taxable period September 30, 1944 to December 31, 1944 with the collector at Pittsburgh. The return disclosed an excess profits net income of $679,609.22, determined under section 711 (a) (3) (A) of the Internal Revenue Code, and an excess profits credit of $1,529,711.46, both of which amounts were based on the income credit method. After adjustment in accordance with a revenue agent's report transmitted March 29, 1951, the plaintiff had no excess profits net income for the taxable period of 1944.

9. On February 6, 1951, the plaintiff, as successor on merger to Koppers Company, executed an "Agreement to Amount of Constructive Average Base Period Net Income Determined Under Section 722, Internal Revenue Code" (Form EPC–1), for the taxable period ended November 10, 1944. The amount of constructive average base period net income agreed to for the taxable period was $3,525,481.13. This amount was approved on March 15, 1951, by the Excess Profits Tax Council of the Bureau of Internal Revenue.

10. On April 17, 1951, the Agent in Charge at Pittsburgh transmitted to the plaintiff a computation of the excess profits tax liability of Koppers Company for the taxable period ended November 10, 1944, after having given effect to the constructive average base period net income of $3,525,481.13. This latter computation showed an excess profits credit of $3,260,875.07, resulting in a proposed overassessment in excess profits tax against Koppers Company for the taxable period ended November 10, 1944, of $153,733.52. The plaintiff on April 18, 1951, filed a "Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and Acceptance of Overassessment" agreeing to the overassessment.

11. The relief (increase in average base period net income) allowed to Koppers Company for its taxable period ended November 10, 1944, under section 722 is $597,171.13. This amount is computed by comparing the determination of the excess profits credit of $2,887,668.09 before section 722 relief, as shown in a revenue agent's report for the taxable period ended November 10, 1944, transmitted on February 6, 1951 with the credit of $3,260,875.07, after giving effect to the relief under section 722 as follows:

	Before Sec. 722 relief	*After Sec. 722 relief*
Average base period net income (Actual average before increase in lowest year in base period under sec. 713 (e) (1), I. R. C.)	$2,928,310.00	$2,928,310.00
Increase in lowest year in base period under sec. 713 (e) (1), I. R. C	204,321.67	0
Amount of relief allowed under sec. 722, I. R. C	0	597,171.13
Total—Average and constructive average base period net income	3,132,631.67	3,525,481.13
95 percent of above	2,976,000.09	3,349,207.07
Deduct—6 percent of net capital reduction of $1,472,200.00	88,332.00	88,332.00
Remainder—Excess profits credit	2,887,668.09	3,260,875.07

12. On October 19, 1944, the Commissioner ruled with respect to Koppers Company, Inc. (New Company):

(a) No recognizable gain or loss, for Federal income and excess profits tax purposes, will result from the receipt by this corporation of all the assets and liabilities of Koppers United Company, Koppers Company, The Koppers Erecting Corporation and Fuel Investment Associates, and the basis to the transferee of the assets received from the merging corporations will be the same as the basis of such assets in the hands of such merging corporations.

(b) All income from long-term lump sum contracts completed by this corporation, subsequent to the date the merger is effected, will constitute income to it for Federal income and excess profits tax purposes.

(c) Upon consummation of the statutory merger referred to above all rights, privileges, conditions, restrictions, limitations and duties of Koppers Company provided for in Section 124 of the Internal Revenue Code, as amended, with respect to any assets transferred by said corporation to said taxpayer pursuant to the above transaction, shall be deemed to continue in and upon said taxpayer on and after the date of said merger, but Koppers Company shall be entitled to take any and all amortization deductions allowable in respect of any emergency facility from the beginning of the sixty-month period up to the date of transfer of such emergency facility in said transaction in case such transfer occurs subsequent to the date of the beginning of such sixty-month period.

(d) Any rights which Koppers United Company and/or the other merging corporations have or would have with respect to the receipt of post-war bonds under the provisions of Section 780 of the Internal Revenue Code shall accrue to this corporation under Section 780 (f) and (g) of the Internal Revenue Code.

13. It has been stipulated in this case that the "taxable year" in which the unused credit arose was the period September 30, 1944 to December 31, 1944, and that the period January 1, 1944 to November 10, 1944 is the first preceding taxable year. The calendar year 1943 which is before the court is therefore the second preceding taxable year for purposes of the carry-back here in question.

14. The plaintiff contends that Koppers Company, by virtue of the merger on November 10, 1944, became a component of the plaintiff under the provisions of section 740 (b) (3). The plaintiff contends that it therefore succeeded to the relief granted under section 722 to Koppers Company for its taxable period ended November 10, 1944. If plaintiff is correct in its contentions, then the excess profits credit of $1,529,711.46, reported by the plaintiff in its excess profits tax return for its taxable period ended December 31, 1944, was properly increased to $1,732,738.44 by adding 51/92 of the $597,171.13 relief allowed Koppers Company for its taxable period ended November 10, 1944, under the provisions of section 722, as follows:

	Return (Form 1121) as filed	*Corrected on basis of Sec. 722*
Average base period net income (Actual average before increase in lowest year in base period under sec. 713 (e) (1), I. R. C.)	$1,521,033.74	$1,521,033.74
Increase in lowest year in base period under sec. 713 (e) (1), I. R. C.	117,327.89	0
Amount of relief allowable under sec. 722, I. R. C. (51/92 of the $597,171.13 relief under sec. 722 allowed Koppers Company)	0	331,040.50
Total—Average and constructive average base period net income	1,638,361.63	1,852,074.24
95 percent of above	1,556,443.55	1,759,470.53
Deduct—6 percent of net capital reduction of $445,534.87	26,732.09	26,732.09
Remainder—Excess profits credit	1,529,711.46	1,732,738.44

15. The excess profits net income of the plaintiff for its taxable period September 30 to December 31, 1944 was less than zero. The plaintiff contends that its unused excess profits credit for this taxable period is therefore 92/366 of $1,732,738.44, or $435,551.74, as determined under the provisions of section 710 (c) (2) of the Internal Revenue Code.

16. In determining the adjusted consolidated excess profits net income for Koppers United Company and Subsidiaries for 1943, the Commissioner of Internal Revenue failed and refused to reduce the net income by the alleged unused excess profits credit of the plaintiff for the taxable period September 30 to December 31, 1944, in the amount of $435,551.74.

CONCLUSION OF LAW

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes that as a matter of law the plaintiff is entitled to recover, with interest as provided by law.

Entry of judgment is suspended pending the filing of memoranda in regard to the section 722 allowance (26 U. S. C. 722) and a stipulation by the parties showing the amount due plaintiff in accordance with this opinion.

In the United States Court of Claims

No. 161-52

KOPPERS COMPANY, INC., SUCCESSOR ON MERGER TO KOPPERS UNITED COMPANY AND SUBSIDIARIES

v.

THE UNITED STATES

ORDER

On October 4, 1955, the court rendered an opinion together with findings of fact holding that plaintiff

was entitled to recover with interest as provided by law but suspended the entry of judgment pending the filing of a stipulation by the parties showing the amount due plaintiff in accordance with the opinion of the court.

In lieu of the filing of said stipulation, a dispute between the parties having occurred with respect to the method of computation, the defendant filed on January 20, 1956, a memorandum in which it is stated that there is due plaintiff in accordance with the opinion of the court the sum of $149,961.87, together with interest thereon, as provided by law, from June 29, 1951.

On January 24, 1956, plaintiff filed a memorandum in which it accepted the figures proposed by the defendant and consented to the entry of judgment for the amount stated above.

Now, therefore, it is ordered this thirty-first day of January 1956, that judgment be and the same hereby is entered for plaintiff in the sum of one hundred forty-nine thousand nine hundred and sixty-one dollars and eighty-seven cents ($149,961.87), together with interest thereon, as provided by law, from June 29, 1951.

By the Court:

MARVIN JONES,
Chief Judge.

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IN THE

Supreme Court of the United States

October Term, 1956

No. 215

UNITED STATES OF AMERICA, *Petitioner*

v.

KOPPERS COMPANY, INC., Successor on Merger to Koppers United Company and Subsidiaries

On Petition For A Writ Of Certiorari To The United States Court of Claims

BRIEF FOR THE RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

October Term, 1956

No. 215

UNITED STATES OF AMERICA, *Petitioner*

v.

KOPPERS COMPANY, INC., Successor on Merger to Koppers United Company and Subsidiaries

On Petition For A Writ Of Certiorari To The United States Court of Claims

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims is reported at 134 F. Supp. 290.

JURISDICTION

The judgment of the Court of Claims was entered on January 31, 1956. The time within which to file a petition for writ of certiorari was extended, by order of the Chief Justice, to June 29, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1255(1).

QUESTION PRESENTED

Whether the unused excess profits credit of the surviving corporation in a Delaware statutory merger may be carried back to a taxable year prior to the merger to reduce the consolidated excess profits net income of the merged corporations under Section 710(c)(3)(A) of the Internal Revenue Code of 1939.

STATUTE INVOLVED

The applicable portions of the pertinent statutes are set forth in the Appendix, infra, p. 8.

STATEMENT

The facts as stipulated and found by the Court of Claims may be summarized as follows.

Koppers United Company and its subsidiaries filed a consolidated excess profits tax return for the year 1943. On November 10, 1944, for the purpose of integrating the operations of the companies, Koppers United Company and its subsidiaries were merged into Koppers Company, Inc., the plaintiff, a corporation organized for this particular purpose. (R. 20-21.) After the merger, the plaintiff had all the powers, franchises, assets, and liabilities of the merged companies under Section 60 of the Delaware General Corporation Law and carried on the same operations. (R. 34.)

For the taxable period ended December 31, 1944, the deductions of the plaintiff exceeded its gross income so that it had no excess profits net income for that period. (R. 26.) It did have an excess profits credit for that period determined from the statutory base period experience of the companies merged into it, as provided for in Sections 740 and 742 of the Internal Revenue Code of 1939. Since the plaintiff had no excess profits net income against which to apply this credit, it was all unused.

The plaintiff sought to carry back this unused credit, but the Commissioner refused to permit it. The Court of Claims, in a unanimous decision, held that the plaintiff was entitled to the carry-back and entered judgment for the plaintiff.

REASONS FOR DENYING THE WRIT

The decision of the Court of Claims is not in conflict with any appellate decision and does not involve the same question as that raised in *Libson Shops, Inc.* v. *Koehler,*

No. 64 this Term, certiorari granted June 4, 1956. It is in agreement with the two other appellate decisions which have disposed of this question, and the decision is correct. The question here presented is no longer of any public importance since the statutory provisions involved were repealed more than 10 years ago (1945).

1. The Government does not allege any conflict, but grounds its petition here on the assertion that the question is "similar" to that presented in *Libson*. (Petition, p. 5.) Indeed, in its Brief in Opposition to the granting of the writ in *Libson*, the Government acknowledged that there was no conflict between that case and *Stanton Brewery, Inc.* v. *Commissioner*, 176 F.2d 573 (C.A. 2d, 1949), and *E. & J. Gallo Winery* v. *Commissioner*, 227 F.2d 699 (C.A. 9th, 1955). Both of these cases held that unused excess profits credits of merged companies could be carried over to reduce the excess profits net income of the surviving corporation for a year following the statutory merger. Thus, *Stanton*, *Gallo* and the instant case are all in accord.

The Government's only reference to the instant case is a footnote in the *Libson* petition in which it said that—

> "The decision below was entered before expiration of the time to apply for certiorari in the *Gallo* case, and the Government obtained an extension of time until April 7, 1956, in order to consider the advisability of applying for certiorari in that case in the light of the decision below. *After consideration, it was concluded that no petition should be filed because of the absence of a conflict.* Nor has a petition been filed by the Government in *Koppers Co.* v. *United States*, 134 F. Supp. 290 (C. Cls.), which presents a similar question and follows *Stanton*. However, the Government has obtained an extension of time for filing a petition in the *Koppers* case until June 29, 1956, because of the possibility that a conflict may be created by the pending case of *Newmarket Manufacturing Co.* v. *United States*, awaiting decision by the First Circuit Court of Appeals." (Emphasis supplied.)

In its application for an extension of time within which to file a petition for a writ of certiorari in the present case, the Government said:

> "Whether the Government will deem it advisable to file a petition in the instant case may be very significantly affected by the outcome of the *Newmarket* case * * *."

Since *Newmarket* has now been decided in favor of the taxpayer, any such conflict has failed to develop. Hence the Government is left with no conflict and merely argues that certiorari should be granted by this Court because the question involved is "similar" to that in *Libson*.

2. The decision of the Court of Claims is in agreement with the only other appellate decisions which have passed upon the question here presented. Both *Stanton* and *Gallo* held that a statutory merger is not a bar to the carry-over of an unused excess profits credit. In neither case did the Government petition for certiorari. No suggestion has been made by the Government that there is any distinction between a carry-over and a carry-back of such a credit and none can properly be made. Compare Sections 710(c)(3)(A) and (B) of the Internal Revenue Code of 1939. The Court of Claims, the Second Circuit and the Ninth Circuit are all in agreement on the question here presented, and no other Circuit Court has held otherwise.

3. The question here presented is of no public importance. Carry-overs of net operating losses such as those involved in *Libson* are still provided for in the taxing statutes. The present case, however, arises under the World War II excess profits tax which was repealed over ten years ago. Having failed to petition for certiorari in *Stanton* (1949) and *Gallo* (1955), in both of which the taxpayer received the benefit of a carry-over of an unused excess profits credit, the Government now seeks to persuade this Court to consider whether a different rule should be applied to this taxpayer. We respectfully submit that the matter is

now of no public importance, and that since the Court of Claims, the Second Circuit and the Ninth Circuit are in agreement on the law, the writ should be denied.

4. The decision of the Court of Claims is correct. It is apparent from the interrelationship of Sections 710, 712, 713, 742, and 740 that Congress has provided that a corporation such as the plaintiff and its components shall be treated as the same taxpayer for the purpose of determining its unused excess profits credit. Congress has provided in Section 710 (c)(3)(A) that such an "unused excess profits credit shall be an unused excess profits credit carryback for each of the two preceding taxable years." Thus, the specific language of the applicable sections allows the taxpayer the carry-back in this case.

Aside from the fact that Congress has specifically provided that corporations such as the plaintiff and its components are to be treated as the same taxpayer for purposes of Section 710, it is well settled that a surviving corporation in a statutory merger is the same taxpayer as the merged corporations.

Under Section 60 of the Delaware Corporation Law, the merger into the plaintiff of the four constituent companies resulted in the absorption by the plaintiff of the identities of those companies and their existence continued in the plaintiff. *Argenbright* v. *Phoenix Finance Co. of Iowa*, 21 Del. Ch. 288, 187 A. 124 (1936); *Aspinook Corp.* v. *Commissioner*, 326 Mass. 327, 94 N.E. 2d 366 (1950). This Court in *Helvering* v. *Metropolitan Edison Company*, 306 U.S. 522 (1939), endorsed the principle that "the identity of the corporation [which was merged] continues in the successor ***". Therefore, the plaintiff here is the same "taxpayer" as the consolidated group of companies merged into it and is entitled to carry back its 1944 unused excess profits credit to reduce the 1943 tax liability of the merged corporations. *Stanton Brewery, Inc.* v. *Commissioner*, 176 F.2d 573 (C.A. 2d, 1949); *E. & J. Gallo Winery* v. *Commissioner*, 227 F.2d 699 (C.A. 9th, 1955).

Also, upon consummation of a statutory merger, the surviving corporation becomes directly and primarily liable as "the taxpayer"—and not secondarily liable as transferee—for the income and excess profits taxes of its constituent companies for years prior to the merger. *Commissioner* v. *Oswego Falls Corporation,* 71 F.2d 673 (C.A. 2d, 1934); *United States* v. *Oswego Falls Corporation,* 113 F.2d 322 (C.A. 2d, 1940); *Adrian & James, Inc.,* 4 T. C. 708 (1945); and *The Koppers Coal Company,* 6 T. C. 1209 (1946). Since the surviving corporation is liable as the taxpayer for the taxes of its components for past years, it is only rational to allow it to use its unused credits against these taxes.

For purposes of review by the Tax Court, the surviving corporation is also treated as "the taxpayer" in situations involving transactions of its components before the merger. *Bowman Hotel Corporation* v. *Commissioner,* 24 B.T.A. 1193 (1931), and the many cases following that decision. It was treated as the same taxpayer for carry-over of the adjusted declared value for capital stock tax purposes in *Early* v. *Southgate Corporation,* 136 F.2d 217 (C.A. 4th, 1943). The surviving corporation was treated as the same taxpayer for the deduction of unamortized bond discount and expense in connection with a redemption of bonds of a component company in *Helvering* v. *Metropolitan Edison Co.,* 306 U.S. 522 (1939).

The *Metropolitan Edison* case, *supra,* squarely decided that the surviving corporation in a statutory merger was entitled to deduct the unamortized bond expense of the component because it was considered the same taxpayer as its component. For all practical purposes, and in substance, the surviving corporation in a statutory merger represents the continuation of the business of the components under a different form. As the Court stated in *Stanton*—

> "**** we must regard the 'resulting corporation' as the union of component corporations into an all-embracing whole which absorbs the rights and privileges, as well as the obligations, of its constituents." (176 F.2d 573, 575.)

The foregoing decisions leave no doubt that the plaintiff was liable as a result of the merger for the tax originally imposed upon its components for 1943. Whether that tax be the original tax or a deficiency determined before or after the merger or a tax retroactively imposed, the plaintiff's liability was primary and direct and not that of a transferee. Hence, the plaintiff here seeks merely to carry back its own unused credit against its own tax liability for a prior year.

5. Actually, the Government does not really urge that the writ be granted, but merely suggests that the petition be held in abeyance pending the Court's decision in *Libson*. (See Petition, p. 7, and Petition in *Newmarket*, p. 5.) This position is apparently taken with the thought that, in considering the net operating loss carry-over issue involved in *Libson*, the Court will go beyond the case before it "to consider the broad question whether a carry-over or carry-back may, in any circumstances, cross the line of a merger."

The Government does not suggest how the Court can properly decide an unused excess profits credit issue in a net operating loss case. The *Libson* case arises under Section 122 of the Internal Revenue Code which is substantially different from the setting and background of Sections 710, 712, 713, 740 and 742 of the Code under which this case arises. In addition, the tax benefit sought in that case resulted solely from the merger. Had the three corporations with the net operating losses not been merged with the fourteen other corporations, a tax benefit for the year under consideration would not have been available. In the instant case the unused excess profits credit arose after the merger and the tax benefit would have been available to the consolidated group in the absence of the merger.

We submit that for the reasons stated, the writ should be denied. If the Court is not so inclined, then we respectfully urge that the writ be granted and that an opportunity

be afforded the plaintiff to file briefs and present oral argument.

Respectfully submitted,

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APPENDIX

Internal Revenue Code of 1939:

CHAPTER 2—ADDITIONAL INCOME TAXES

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SUBCHAPTER E—EXCESS PROFITS TAX

Part I

SEC. 710. IMPOSITION OF TAX.

(a) *Imposition.*—

(1) *General Rule.*—There shall be levied, collected, and paid, for each taxable year, upon the adjusted excess-profits net income, as defined in subsection (b), of every corporation (except a corporation exempt under Section 727) a tax equal to whichever of the following amounts is the lesser:

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(b) *Definition of Adjusted Excess Profits Net Income.*—As used in this section, the term "adjusted excess profits net income" in the case of any taxable year means the excess profits net income (as defined in section 711 minus the sum of:

(1) *Specific exemption.*— * * *

(2) *Excess profits credit.*—The amount of the excess profits credit allowed under section 712; and

(3) *Unused Excess profits credit.*—The amount of the unused excess profits credit adjustment for the taxable year, computed in accordance with subsection (c).

(c) *Unused Excess Profits Credit Adjustment.*—

(1) *Computation of unused excess profits credit adjustment.*—The unused excess profits credit adjustment for any taxable year shall be the aggregate of the unused excess profits credit carry-overs and unused excess profits credit carry-backs to such taxable year.

(2) *Definition of unused excess profits credit.*—The term "unused excess profits credit" means the excess, if any, of the excess profits credit for any taxable year beginning after December 31, 1939, over the excess profits net income for such taxable year, computed on the basis of the excess profits credit applicable to such taxable year. * * *

(3) *Amount of unused excess profits credit carry-back and carry-over.*—

(A) *Unused Excess Profits Credit Carry-Back.*—If for any taxable year beginning after December 31, 1941, the taxpayer has an unused excess profits credit, such unused excess profits credit shall be an unused excess profits credit carry-back for each of the two preceding taxable years, * * *

(B) *Unused Excess Profits Credit Carry-Over.*—If for any taxable year beginning after December 31, 1939, the taxpayer has an unused excess profits credit, such unused excess profits credit shall be an unused excess profits credit carry-over for each of the two succeeding taxable years, * * *

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(26 U. S. C. Sec. 710.)

Sec. 712. EXCESS PROFITS CREDIT—ALLOWANCE.

(a) *Domestic Corporations.*—In the case of a domestic corporation which was in existence before January 1, 1940, the excess profits credit for any taxable year shall be an amount computed under section 713 or section 714, whichever amount results in the lesser tax under this subchapter for the taxable year for which the tax under this subchapter is being computed. * * *

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(d) *Special Rule in Connection with Certain Reorganizations.*—For the existence of taxpayer through component corporations, see section 740(f).

(26 U. S. C. Sec. 712.)

Sec. 713. EXCESS PROFITS — BASED ON INCOME.

(a) *Amount of Excess Profits Credit.*—The excess profits credit for any taxable year, computed under this section, shall be—

(1) *Domestic corporations.*—In the case of a domestic corporation—

(A) 95 per centum of the average base period net income,

(B) Plus 8 per centum of the net capital addition as defined in subsection (g), or

(C) Minus 6 per centum of the net capital reduction as defined in subsection (g).

(d) *Average Base Period Net Income.—Determination.*—

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(4) For the computation of average base period net income in the case of certain reorganizations, see section 742.

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(26 U. S. C. Sec. 713.)

Sec. 740. DEFINITIONS.

For the purposes of this Supplement—

(a) *Acquiring Corporation.*—The term "acquiring corporation" means—

* * * * *

(3) A corporation the result of a statutory merger of two or more corporations; * * *

* * * * *

(b) *Component Corporation.* — The term "component corporation" means—

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(3) In the case of a statutory merger, all corporations merged, except the corporation resulting from the merger; * * *

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(f) *Existence of Acquiring Corporation.* — For the purposes of section 712(a), if any component corporation of the taxpayer was in existence before January 1, 1940, the taxpayer shall be considered to have been in existence before such date.

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(26 U. S. C. Sec. 740.)

Sec. 742. SUPPLEMENT A AVERAGE BASE PERIOD NET INCOME.

In the case of a taxpayer which is an acquiring corporation, its average base period net income (for the purpose of the credit computed under section 713) shall be the amount computed under section 713 or the amount of its Supplement A average base period net income, whichever is the greater. The Supplement A average base period net income shall be the amount computed without regard to subsection (h) of this section or computed under subsection (h) of this section, whichever is the greater. The Supplement A average base period net income shall be computed as follows:

(a) By ascertaining with respect to each of its base period years—

(1) The amount of its and each of its component corporation's excess profits net income for each of its and such component corporation's taxable years beginning with or within such base period year; * * *

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(26 U. S. C. Sec. 742.)

General Corporation Law of Delaware

Sec. 60. Status, right, liabilities, etc., of constituent and surviving corporations following merger or consolidation

When an agreement shall have been signed, acknowledged, filed and recorded, as in Section 59, Section 59B or in Section 59C of this chapter is required, for all purposes of the laws of this State the separate existence of all the constituent corporations, parties to said agreement, or of all such constituent corporations except the one into which the other or others of such constituent corporations have been merged, as the case may be, shall cease and the constituent corporations shall become a new corporation, or be merged into one of such corporations, as the case may be, in accordance with the provisions of said agree-

ment, possessing all the rights, privileges, powers and franchises as well of a public as of a private nature, and being subject to all the restrictions, disabilities and duties of each of such corporations so consolidated or merged, and all and singular, the rights, privileges, powers and franchises of each of said corporations, and all property, real, personal and mixed, and all debts due to any of said constituent corporations on whatever account, as well for stock subscriptions as all other things in action or belonging to each of such corporations shall be vested in the corporation resulting from or surviving such consolidation or merger; and all property, rights, privileges, powers and franchises, and all and every other interest shall be thereafter as effectually the property of the resulting or surviving corporation as they were of the several and respective constituent corporations, and the title to any real estate vested by deed or otherwise, under the laws of this State, in any of such constituent corporations, shall not revert or be in any way impaired by reason of this Chapter; provided, however, that all rights of creditors and all liens upon any property of any of said constituent corporations shall be preserved unimpaired, and all debts, liabilities and duties of the respective constituent corporations shall thenceforth attach to said resulting or surviving corporation, and may be enforced against it to the same extent as if said debts, liabilities and duties had been incurred or contracted by it.